U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

Date: June 16, 1998

Case No.: 97 INA 349

In the Matter of

FAITH UNITED METHODIST CHURCH
Employer

in behalf of

JOSEFINA DUARTE FLORES,
Alien

Appearance: R. H. Hsueh, Esq., of Dallas, Texas.

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of JOSEFINA DUARTE FLORES ("Alien") by FAITH UNITED METHODIST CHURCH ("Employer") under § 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act"), and regulations promulgated thereunder at 20 CFR Part 656. After the Certifying Officer ("CO") of the U.S. Department of Labor at Dallas, Texas, denied the application, the Employer appealed pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On December 27, 1995, the Employer applied for alien labor certification on behalf of the Alien to fill the position of "Choir Director" in the Employer's Church. AF 74. The position was classified as a "Choral Director," under DOT Occupational Code No. 152.047-010..[2] The Employer described the job duties as follows:

> Conduct church choir group for scheduled worships; Select Christian music pieces to suit performance requirements and accommodate talent and ability of choir; Transcribe musical compositions and melodic lines to Pilipine language and/or create particular style for Pilipino congregation; Design, coordinate, audition and direct Pilipino theme musicals to special occasions; Introduce choir members to Pilipino musical instruments for their accompaniment; and Choreograph Pilipino dances and incorporate them in choir's repertoire.

AF 74 at Item 13. (Copied verbatim without correction.)[3] The minimum education for a worker to perform satisfactorily the job duties described in Item 13 of ETA Form 750A was a baccalaureate degree in Music Education as the Major Field of Study. The experience requirement was two years in the Job Offered or in the Related Occupation of Music Teacher. *Id.*, at Item 14.[4] The Other Special Requirements were the following:

> Must be willing to work evenings and weekends. The required two years experience must include:
> 1) Adaptation of Pilipino music pieces by piano and organ.
> 2) Must be fluent in native Philipino languages.

Id., item 15. (Copied verbatim without correction.) No U. S. job applicants responded after this

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2Administrative notice is taken of the Dictionary of Occupational Titles (DOT), published by the Employment and Training Administration of the U. S. Department of Labor.

3The words Philippine and Filipino appear to be misspelled.

4The hours were 10:00 AM to 7:00 PM in a forty hour week from Tuesday through Sunday for a salary of $18,000 per year, with no provision for overtime.

position was advertised and posted. AF 43.

Notice of Findings. Subject to the Employer's rebuttal under 20 CFR § 656.25(c), the CO denied certification in the Notice of Findings ("NOF") dated January 31, 1997. AF 41-42. Citing 20 CFR § 656.21(b)(5), the CO said the Employer was required to document that the hiring criteria for the position described represented its actual minimum requirements for the job, and that it had not hired and could not hire workers with less training or experience than it had specified to do the work.

Rebuttal. The Employer's rebuttal addressed the issue stated in the NOF. AF 13-14 The Employer did not add to or otherwise amend the hiring criteria of its application, saying,

> The reason we do not elaborate on the details of what are the qualifications o[r] equivalent of Bachelors Degree in Music Education is that we do not want to restrict on the equivalency test or standard. What we consider equivalent is the same standards as those acceptable to those education evaluation agencies which are certified by INS or the U. S. Government.

AF 13.

Final Determination. The CO denied certification in the Final Determination issued of March 31, 1997. The CO found that the Employer failed to amend its hiring criteria to state precisely what qualifications it would deem equivalent to a baccalaureate degree in terms of experience and/or education or a combination of both. As the Employer failed to comply with the directions of the NOF, the CO denied alien labor certification because the application did not state the actual minimum requirements of the Position Offered .
as required by 20 CFR § 656.21(b)(5). AF 11.

Appeal. Following the denial of certification, the Employer requested review of the Final Determination on May 1, 1997, citing subsections of 8 CFR § 224.5 that applied to immigration as a "Professional." (Emphasis as in text of AF 01.)

Discussion

While an employer may adopt any qualifications it may fancy for the workers it hires in its business, it must comply with the Act and regulations when employer seeks to apply such hiring criteria to U. S. job seekers in the course of testing the labor market in pursuing its application for alien labor certification. This Employer's hiring requirements require the construction and application of the DOT provisions regarding Specific Vocational Preparation ("SVP") for this position under the DOT. Notwithstanding its confusing rebuttal statement, the Employer's appeal contends that the Alien's education, training and experience equal the qualifications described in the DOT for the position of "Choral Director" under DOT Occupational Code No. 152.047-010.

The record established that the Alien graduated from University of Santo Thomas in the Philippines and was awarded a Music Teacher Diploma in 1966. The record does not indicate what she did for a living until 1982. From 1982 to 1984 she was a Private Tutor engaged in work as Music Teacher of Piano and Organ. From 1992 to July the Alien said only that she was "On Vacation." Beginning July 1994 and continuing until September 1996, the date of this application, the Alien was the Employer's Choir Director. During that period of time she acquired all the experience she claimed in this application when she performed all of the job duties described by Form ETA 750 A. An evaluator said her music education at the University was equal to four years of university level credit in music education from an accredited college or university in the United States, however. AF 81-94. As the SVP for a Choral Director under DOT Occupational Code No. 152.047-010 ranges from four to ten years of combined education, training, and experience, such evidence of the equivalency of her schooling and a baccalaureate degree and the Employer's provision of a Related Occupation as alternative acceptable experience are critical to the Alien's qualification for this job. For these reasons the issue Employer's appeal presents is whether the Alien's studies, as evaluated by the consultant whose report it offered, equals the education, training and work experience that Employer's job offer specified. The panel must determine whether the four years during which the Alien studied to become a music teacher equaled the level of education and experience as a Choir Director that the Employer indicated it would accept.

The employer must establish that the alien possesses the stated minimum requirement for the position. **Charley Brown's**, 90 INA 345 (Sep. 17, 1991). The employer may not require more experience of U. S. workers than the alien offers, however. **Western Overseas Trade and Development Corp**., 87 INA 640 (Jan. 27, 1988).[5]g4
In Appendix C the DOT defined the Specific Vocational Preparation (SVP) as the amount of time that is required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job. The DOT explained that,

> This training may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs."

The issue to be determined in this case relates to the provision of Appendix C that the requisite training may be acquired in a school, work, military, institutional, or vocational environment, and that the SVP includes vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs. The brief filed by the Employer argued that the Alien's four years of schooling that led to a diploma as Music Teacher equal to a baccalaureate degree in Music Education.

5Certification is properly denied under 20 CFR § 656.21(b)(6) where the alien does not meet the employer's stated job requirements. **Marston & Marston, Inc.**, 90 INA 373 (Jan. 7, 1992).

Kellogg. This reasoning is consistent with the Board's holding in **Francis Kellogg, *et als.***, 95 INA 068 , 94 INA 544, 95 INA 068 (Feb. 2, 1998)(*en banc*), where the BALCA recently considered the use of alternative experience requirements.[6] We held in **Kellogg** that where the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer's alternative requirements are regarded as unlawfully tailored to the alien's qualifications in violation of 20 CFR § 656.21(b)(5) unless the employer has indicated that all candidates for a job whose qualifications offer any suitable combination of education, training or experience are acceptable. **Francis Kellogg, *et als.***, *supra*.

Applying **Kellogg** to the instant case, even if the panel were to assume that the four year college curriculum specified in the educational requirement is equal to the four years of specific vocational preparation noted in the DOT, examination of the record fails to disclose the Employer's object in requiring two years of experience in the Job Offered in addition to the baccalaureate degree it requires. Moreover, since the Alien offered no experience that is equal to the background she acquired in the Job Offered, the Employer's acceptance of two years as a Music Teacher is suspect. The Alien's application and the documents supplied by the evaluator make it clear that the work as a music teacher was primarily in private tutoring, that no choral work whatsoever was involved, and that the Alien's last work of any kind before being hired by the Employer was of doubtful length and ended when she went "on vacation" many years earlier.

As a result, Employer's experience requirement is vague, and its rebuttal failed to proffer sufficient evidence to support the finding that this Alien's studies and work experience were, in fact, equal to two years of germane "experience" to qualify for this job. As a result, the panel cannot accept the Employer's unsupported assumptions as definitive, as this would ignore the possibility that the Employer's criteria for the position were tailored to the Alien's own qualifications, and would treat the Alien more favorably than Employer would treat the job application of a U. S. worker. **ERF, Inc., dba Bayside Motor Inc.**, 89 INA 105 (Feb. 14, 1990); 20 CFR § 656.21(b)(6).

Summary. While the experience that the Employer intended to require in its application is relevant and essential to the determination of this matter, the Employer failed to disclose precisely what combination of education and experience constituted its actual minimum requirements for

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6We first held in **Kellogg** that any job requirements listed by an employer on the ETA Form 750A, including alternative requirements, must be read as the employer's stated minimum requirements which, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States, shall be those defined for the job in the DOT, and shall not require a language other than English. 20 CFR § 656.21(b)(2). While legitimate alternative job requirements exist that can and should be permitted in the labor certification process, such alternative hiring standards must be treated as substantially equal to each other in deciding whether a U. S. worker seeking the job can perform the duties of the position being offered in a reasonable manner. It follows that an employer's alternative hiring standard can be considered normal under 20 CFR § 656.21(b)(2) in a case where employer's primary job requirement is considered normal for the position in the United States and (b) that alternative requirements are substantially equal to the primary standard in deciding whether the alien or any U. S. job applicant can perform in a reasonable manner the duties of the job offered.

this job. As the NOF clearly explained its omission and its Rebuttal did not amend Form 750 A of the application, the record was unchanged at the time of the Final Determination denying certification under 20 CFR § 656.21(b)(5). For these reasons the panel has concluded that the conclusion of the Certifying Officer denying alien labor certification was supported by the evidence of record and should be affirmed.

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.